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NO. 283

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

THE APPENDIXES

DONALD F. KNOX
Petitioner

vs.

THE STATE OF OHIO
Respondent

Donald F. Knox
127 W. Northwood Ave.
Columbus, Ohio 43201
Petitioner

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APPENDIX A

Decision of the State Personnel Board of Review

April 9, 1965

Dear Mr. Knox:

The matter of the appeal of Donald F. Knox, Ohio State University, comes on before the Board upon the appellee's motion to dismiss the appeal upon the ground that the appellant failed to bring his appeal within a reasonable time and in a reasonable manner.

The undisputed facts show that the appellant's employment as a Night Clerk at Ohio State University Hospital was terminated on May 14, 1964. It appears that the proper procedure for the removal of an employee in the classified civil service was not followed by the appointing authority for the alleged reason that such appointing authority believed the appellant to be an administrative officer under the exempted category contained in Revised Code Section 143.08, subparagraph (7).

If appellant had, in fact, been such an administrative officer, he would have had no right of appeal to this Board from the procedure followed. If he were not, he had the opportunity to promptly appeal the allegedly non-complying removal. Instead, the appellant did nothing until October 19, (sic 9), 1964, a lapse of time of over five months.

His rights could have been promptly and properly determined; having "slept" on those rights, he cannot now complain.

The motion to dismiss is sustained upon the ground of failure to bring his appeal within a reasonable time (whether or not he was bound by the statutory limitation).

In view thereof, we need not pass upon the second question raised, i.e. whether or not the appeal was brought in a reasonable manner.

The appeal is hereby dismissed.

It is hereby certified by this Board that the above language is a copy of the order entered upon its journal in this case. This decision may be appealed under the provisions of Chapters 143 and 119, Ohio Revised Code, by written notice of appeal setting forth the order appealed from and grounds of appeal filed with this Board and the appropriate court within fifteen days after the mailing of this letter.

Very truly yours,

State Personnel Board of Review

/s/ Earl W. Allison, Chairman
/s/ John P. Cook, Member
/s/ Lowell Fess, Member

APPENDIX B

Decision of the Common Pleas Court, Franklin County, Ohio In re Appeal of Donald F. Knox

DECISION No. 223,181

Rendered this 28th day of October, 1965.

REYNOLDS, J.

This case is before the Court on appeal from a decision of the State Personnel Board of Review, sustaining a motion to dismiss the appeal from an order of the Ohio State University terminating the employment of Donald F. Knox.

The employment was terminated on May 14, 1964, without complying with the provisions of Sec. 143.27 on the basis that Knox was not in the Classified Service and for that reason the statutory provisions are not applicable. Sec. 143.27 provides in part as follows:

> "The tenure of every officer or employee in the classified service of the state and the counties, cities, city health districts, and city school districts thereof, holding a position under sections 143.01 to 143.48, inclusive, of the Revised Code, shall be during good behavior and efficient service and no such officer or employee shall be reduced in pay or position, suspended, or removed, except for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of state personnel or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office.

"In any case of reduction, suspension of more than five working days, or removal, the appointing authority shall furnish such employee with a copy of the order of reduction, suspension; or removal, which order shall state the reasons therefor. Such order shall be filed with the director of state personnel and state personnel board of review, or the commission, as may be appropriate.

"Within ten days following the filing of such order, the employee may file an appeal, in writing, with the state personnel board of review or the commission. In the event such an appeal is filed, the board or commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the board or commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority.

"In cases of removal or reduction in pay for disciplinary reasons, either the appointing authority or the officer or employee may appeal from the decision of the state personnel board of review or the commission to the court of common pleas of the county in which the employee resides in accordance with the procedure provided by section 119.12 of the Revised Code."

It is to be noted that these provisions relate only to persons in the Classified Service and have no application to those not in the Classified Service. If appellant was in the classified service, the termination was illegal, but if he was not in the classified Service, the action terminating his service was legal.

On October 4 (sic 9), 1964, appellant filed an appeal with the State Personnel Board of Review and on December 1, 1964, the Board heard the appeal and heard evidence

on the motion to dismiss filed by the Attorney General of Ohio, but no decision was reached.

The motion to dismiss was on the ground that the appellant was in the Unclassified Service and the Board of Review had no jurisdiction to hear the appeal. Why this question was not decided, does not appear and there is no explanation for a failure to decide.

Nothing further apparently having been done, the Attorney General on March 18, 1965, filed another motion to dismiss, was sustained by the State Personnel Board of Review. It is from this decision that the present appeal was taken.

The Court has read the record and has reached the conclusion that the position of Knox was such that it was not within the Classified Service and that therefore his services could be terminated without a compliance with the provisions of the statute relating to employees who were in the Classified Service.

The classification of an employee is determined by the duties which are attached to his job or position and is not determined by the particular name of the position filled.

The record shows that on May 17, 1963, Donald F. Knox was hired by the Ohio State University as an Administrative Assistant. On November 15th, 1963, his title was changed to Chief, Night Clerk, but his duties remained the same, and the change of title was only for the reason that other hospitals used the title "Night Clerk" for those persons performing the same duties as were being performed by Knox.

Following are designated by the hospital as the duties and responsibilities of the evening and night Administrative Assistant:

"1. Thoroughly acquaint yourself with the type of work being performed throughout the hospitals and Starling Loving Hall, in all departments and areas.

2. Be available to provide consultation with the night supervisors for administrative actions when necessary.

3. Be familiar with information and instructions in the Press Code and Guide for Interns and Residents.

4. Maintain close contact with the Emergency Room, Morgue, Information Desk, Admitting Office, Night Nursing Supervisor, Maintenance Engineer and Switchboard.

5. The Night Administrative Assistant will maintain his office in Room 185-B on the first floor of University Hospital, telephone #4064.

6. A journal will be maintained in which all important and unusual events will be accurately recorded.

7. Two complete physical tours of the hospital will be made, one during the first half of duty period and one during the latter half.

8. The tour of duty of the Evening and Night Administrative Assistants shall be seven days per week from 5:30 p.m. to 12:30 a.m. and 12:30 a.m. to 8:30 a.m.

9. The switchboard operator and nursing supervisor should know which Administrative Assistant is on duty.

10. Projects will be assigned periodically by the Administrator's Office."

Following is a copy of the contract of employment here involved, so far as applicable:

"Donald F. Knox
The Ohio State University
401

This is written to relate the terms of agreement concerning your employment during 1963-1964. Because the University must have your acceptance before it can complete the appointment procedures, please sign and return the original agreement to this office. The other copy is for your files.

At its meeting held on the above date, the Board of Trustees of The Ohio State University appointed you to the University position listed below. The terms of your appointment are:

1. Title: Administrative Assistant.
2. Department: University Hospital.
3. Salary: $4,224 per year.
4. Your salary will be for service as indicated below and will be paid in equal installments on a twelve months basis, effective July 1, 1963.

* * *

This agreement, including the payment of salary, is subject to the sufficiency of legislative salary appropriations or the receipt of sufficient funds in the Account specified above. The pertinent provisions of the Revised Code of Ohio, of the By-Laws of the Board of Trustees, of the Rules for the University Faculty, and of the Official Actions of the Board of Trustees are expressly incorporated herein and this agreement is conditioned upon full compliance therewith.

John T. Mount,
Secretary, Board of Trustees

I hereby accept appointment under the above terms and agree to render service in accordance therewith.
(signed) Donald F. Knox Date: July 10, 1963"

Revised Code Sec. 143.08 sets out in detail all those employees who are in the unclassified service, and among those so listed, are "deputies and assistants of ** principal executive officers authorized to act for and in the place of their principals ** ."

The Court concludes from the record that Donald F. Knox was, in fact, in the unclassified service and that being the case, the formalities set out in G.C. Section 143.27 were not required to be followed in terminating his services.

The decision of the State Personnel Board of Review is therefore affirmed and the appeal dismissed.

/s/ Dana F. Reynolds, Judge

APPENDIX C

Decision of the Court of Appeals of Franklin County, Ohio. In re Appeal of Donald F. Knox May 3, 1966.

SHERER, J.

It has been stipulated herein that appellant was hired as an employee of the Ohio State University Hospital on May 17, 1963; that the title of that position was then Administrative Assistant; that the position was considered by the hospital to be in the unclassified service; that on September 1, 1963, the title of the position was changed to Chief, Night Clerk, without any change of duties; that appellant's employment was terminated on May 15, 1964, and that the employer did not proceed in accordance with the provisions of Section 143.27 of the Revised Code relating to the removal of employees in the classified service, because the hospital considered appellant's position to be in the unclassified service.

Appellant appealed the termination order of the hospital to the State Personnel Board of Review on October 8 (sic 9), 1964. On December 1, 1964, the hospital moved to dismiss the appeal, contending that appellant's position was in the unclassified service as provided in Section 143.08 (A) (7) of the Revised Code and that said Board of Review has jurisdiction only of appeals of employees in the classified service of the state as conferred by Section 143.012 (A) of the Revised Code. On March 15, 1965, the Hospital further moved for a dismissal of the appeal for the reason that appellant had failed to bring his appeal within a reasonable time and in a reasonable manner. On April 9, 1965, the Board of Review dismissed the appeal for the reason that appellant did not appeal within a reasonable time. The board did not decide the motion of the hospital to dismiss the appeal because appellant was in the unclassified service.

On April 23, 1965, appellant appealed the order of the Board of Review of April 9, 1965, to the Common Pleas Court of Franklin County pursuant to Sections 143.27 and 119.12 of the Revised Code. On December 2, 1965 the Common Pleas Court dismissed the appeal in accordance with its decision of October 28, 1965.

It is appellant's contention that the objective of the hearing before the board on appeal was to examine the nature of the duties performed by him in order to determine whether he had been properly regarded by the hospital as an administrative officer and thus properly placed in the unclassified service or, on the other hand, whether his position was of such a nature that it should have been placed in the classified service affording him civil service protection relative to dismissal as provided in Section 143.27 of the Revised Code.

Section 143.08 of the Revised Code provides that the civil service of the state shall be divided into the unclassified service and the classified service. Appellant contends that the characteristics of the position, Chief, Night Clerk, are such as to place it within the classified service, and that his removal was illegal because the hospital failed to comply with the provisions of Section 143.27 of the Revised Code which relate to the removal of persons in the classified service. It is stipulated that the hospital did not proceed in accordance with such section. Appellant testified (R. 32) that he was carried on the hospital records as an employee in the unclassified service. It is the further contention of appellant that since the characteristics of his position are such as to place it in the classified service, he is entitled to the protection afforded by Section 143.27 of the Revised Code.

The record does not disclose that appellant took a competitive examination for a position in the classified service as provided by Section 143.16 of the Revised Code, or that he was ever on an eligible list as provided by Section 143.19 of the Revised Code, or was ap-

pointed in accordance with the provisions of Section 143.20 of the Revised Code relating to appointments to the classified service. Neither does the record show that appellant took a noncompetitive examination for a provisional appointment in the classified service, or was appointed to such position as provided by Section 143.23 of the Revised Code Relating to provisional appointments in the classified service.

In State, ex rel. Baker v. Wichert, Mayor, 159 Ohio St. 50, 110 N.E. 2d 771, the court held on page 51 that:

> "A person who has never taken a civil service examination, either competitive or noncompetitive, has no standing as a civil service employee and is not entitled to the benefits and protection of the civil service law.***"

That case cited the case of State, ex rel. Lynch v. Taylor, Dir., 136 Ohio St. 417, 26 N.E. 2d 207.

Section 143.012 of the Revised Code empowers the State Personnel Board of Review to hear appeals of employees in the classified service from final orders of appointing authorities relative to discharge. Such Board of Review has other appellate jurisdiction conferred by Sections 143.07, 143.12, 143.27 and 143.272 of the Revised Code. None of these sections empowers the Board to determine that an employee removed from a position in the unclassified service should be considered an employee in the classified service entitled to the protection of Section 143.27 of the Revised Code, where such employee has never taken either a competitive examination and has not been certified for appointment as provided in the civil service laws. We are unable to find any provision in the civil service laws which empowers such board to review the action of the hospital in discharging appellant on the facts disclosed by the record. Appellant's appeal to the Common Pleas Court was from the board's order dismissing

his appeal, not from the reasons given for the order. Appellant's appeal to this court was likewise from the order of the Common Pleas court dismissing his appeal, not from the reason given for the order. Both the State Personnel Board of Review and the Common Pleas Court correctly dismissed appellant's appeal.

The judgment of the Common Pleas Court dismissing appellant's appeal will, therefore, be affirmed.

Judgment affirmed.

DUFFY, J. (Presiding), and CRAWFORD, J., concur.

SHERER AND CRAWFORD, JJ., of the Second Appellate District, sitting by designation in the Tenth Appellate District.

APPENDIX D

Decision of the Supreme Court of Ohio.

December 14, 1966

In re Appeal of Donald F. Knox

Motion for an order directing the Court of Appeals for Franklin County to certify its record.

It is ordered by the Court that this motion is overruled.

Thomas L. Startzman
Clerk

APPENDIX E

Decision of the Court of Appeals of Franklin County, Ohio. In re Appeal of John L. Crabtree, et al.

December 13, 1966

TROOP, J.

John L. Crabtree and five others were employed by the Department of Natural Resources of the State of Ohio and classified as either 8001 Laborer I or 8002 Laborer II. They were dismissed on January 31, 1964, and following the termination of their services attempted an appeal to the State Personnel Board of Review. The board found that they were members of the unclassified service and were, therefore, without a right of appeal. The decision of the board was taken to the Court of Common Pleas of Franklin County which court affirmed the decision of the Board, and from that decision this appeal is taken. The appeals were consolidated in the Common Pleas Court and in this court.

In the course of the hearing before the State Personnel Board of Review, the Attorney General made a motion to dismiss the appeals of the former employees on the ground that the board had no jurisdiction under Section 143.012, Revised Code, to hear appeals of employees in the unclassified service. The motion was sustained. The motion of the Attorney General was supported by evidence designed to show that the former employees were removed from the classified service by an action of the former Civil Service Commission under date of January 12, 1950, as authorized by a section of the General Code, comparable to and essentially the same as the present Section 143.08 (a) (12), Revised Code. The action taken by the commission, as included in the minutes of the body (R. 13), reads as follows:

"*** The Commission directed that appointments made under the classifications of 8001, Laborer I, and

8002, Laborer II, in the State Service be considered as in the unclassified service under the provisions of Section 486-8A-12 of the General Code since it was decided that it would be impractical at this time to include such unskilled labor positions in the competitive classified service. However, this action may be rescinded if at a later time, it could be found practicable to include either or both such classifications in the competitive classified service. ***"

Section 143.27, Revised Code, provides that all employees in the classified service shall have tenure in their positions, Section 143.08, Revised Code, divides the Civil Service into two basic categories, the unclassified and classified service. In turn, subsection (B) divides the classified group into (1) the competitive class, and (2) the unskilled labor class. Included in the competitive class are all those positions wherein it is practicable to determine the merit and fitness of an applicant by competitive examinations. Appointments to the unskilled labor positions are made without competitive examinations from lists of eligible people compiled by the Director of Personnel, or a local commission, after examination or testing with respect to age, residence, physical condition, ability to labor, etc. The unskilled laborer is nonetheless in the classified service and entitled to the protection afforded civil servants, including the processes required by Section 143.27, Revised Code.

All of this seems reasonably clear until we are confronted with a peculiar, if not contradictory, provision contained in Section 143.08 (A) (12), which is the center of the problem in the instant case. The applicable parts of the subsection are as follows:

"(A) The unclassified service shall comprise the following positions, which shall not be included in the classified service. ***

> "(12) *** such unskilled labor positions as the director of state personnel *** may find it impracticable to include in the competitive classified service, provided such exemptions shall be by order of the commission or the director duly entered on the record of the commission or the director with the reasons for each such exemption."

Unskilled laborers are not intended to be included in the competitive classified service as is clear from the act of the Legislature. The language referring to unskilled laborers contained in the above quotation - "impracticable to include in the competitive classified service" - seems flatly contradictory. Some years ago, the Attorney General was called upon to interpret the language and to resolve the conflict and he held, 3 O.A.G. 227 (1915), that the term "competitive classified service" as used in the paragraph was intended to mean and does mean simply "classified service." Such an interpretation is reasonable and is accepted.

Our problem still remains in spite of this interpretation. In the instant case, removal of the unskilled laborers from the classified service to the unclassified service was by act of the former Civil Service Commission under statutory authority the same as that given to the director by the present law. The last action officially taken was on January 12, 1950. The Attorney General argues that the law has been the same for fifty years "and the policy" the same "for at least the last forty-one of those years." (Brief, 7.) In all that period of time there has been no contest of the law nor challenge of the policy and practice says the Attorney General. Certainly, there are no reported cases.

A square look at the provision reveals an important direction attached to the power of transfer or exclusion. The director, or the old Civil Service Commission, may exclude unskilled laborers "by order," "duly entered on

the record" - "with the reasons for each such exemption." An examination of the January 12, 1950, order under which the State of Ohio is still operating, reveals that the commission simply found it impractical to include such unskilled laborers under Classifications 8001 and 8002, Laborer I and Laborer II, in the competitive classified service. The order is totally void of any "reason for each such exemption."

Prior orders of the commission at least make some effort to comply with the requirement of a finding and a supporting reason therefor. On April 20, 1923 (R. 18), they found difficulty in giving practical examinations "fairly testing relative capacity" of unskilled laborers. Included in the minutes is the statement that the problem was due to excessive turnover in common, unskilled labor positions in the State Highway Department together with the temporary character of the majority of such positions.

On August 8, 1930 (R. 16), the commission excluded unskilled laborers earning $4.00 per day or less from the classified service but retained those earning in excess of $4.00 per day except where due to local conditions they were specifically placed in the unclassified group. The supporting reason for the order isn't clearly stated, but the language suggests troublesome variations in rate and labor supply throughout the state.

In the December 23, 1941, order (R. 15), several reasons are stated. A national emergency due to war, a rise in the cost of living, and excessive turnover incident to the difficulty in securing common laborers, are facts advanced in support of the order. Peculiar conditions are recognized in Cuyahoga and Hamilton Counties and the order varied to meet them.

These attempts to comply with all of the requirements of the statute are sharply in contrast to the order of January 12, 1950, which makes no attempt whatever to suggest a reason for the exclusion. The next result

of such an order is to exclude all unskilled laborers in state service from the protection of the civil service statutes because it is more convenient or because policy has developed the way by accident or design.

The error of attempting wholesale transfer of unskilled workers to the unclassified service is further emphasized by a close look at the involved statutory language. Section 143.08 (B) (2), Revised Code, refers to the unskilled labor "class," whereas Section 143.08 (A) (12) says "such unskilled labor positions." It seems perfectly clear that positions are transferable, not an entire unskilled class. Specifically, not the entire Classes 8001, Laborer I, and 8002, Laborer II, but only certain positions within the class and that for a particular reason.

The legislature intended that unskilled laborers should be included in the classified service or it would never have enacted Section 143.08 (B) (2), Revised Code. To hold that at the same time a provision was enacted that would permit an administrative officer or body to nullify the section by administrative fiat is beyond the point of reason. If unskilled laborers are to be removed from the classified service, it should be by legislative act. Until such time as there is legislative change, the statute providing for noncompetitive examinations and appointment from lists of qualified applicants should be followed and only distinct and unusual situations be met by administrative orders supported by adequate reasons.

The question presented by this case has never been squarely faced before. The Attorney General (R.8) says that at least as far back as 1923 the unskilled labor class has been covered by a Civil Service Commission order "placing the unskilled labor class in the unclassified service." If that proposition be accurate, then over that period of time there has been complete and wholesale disregard for the provisions of Section

143.08 (B) (2), Revised Code, and nobody, court or otherwise, has considered and ruled upon the practice. The opinion of the Attorney General in 1915, supra, considered unskilled laborers employed by a county and held that they were in classified service unless removed by a Civil Service Commission order.

In the case of the State, ex rel. Stein, v. Department of Highways of the State of Ohio, et al., 136 Ohio St. 252 (1940) one Joseph Stein asserted that he was an unskilled laborer and in the classified service. The Supreme Court held (page 255) that his amended petition did not disclose any averment that could be construed as compliance with the statutory registration requirement (Section 143.08 (B) (2), Revised Code, and that, therefore, he could not claim tenure. The effect of the peculiar or conflicting provision in the (A) (12) part of the section is not even mentioned.

So in this court's decision, In the Matter of the Appeal of Donald F. Knox, May 3, 1966, No. 8298. The Court was concerned with the position of only one man held to be in the unclassified service as provided in Section 143.08 (A) (7), Revised Code. The court followed two cases, the State, ex rel. Baker v. Wichert, Mayor, 159 Ohio St. 50 (1953) involving only one person, a clerk employed by a municipality, and the State, ex rel. Lynch, v. Taylor, Director of Dept. of Liquor Control, 136 Ohio St. 417 (1940) the subject being one man, a clerk in a state liquor store.

No one of these cases involves a state employee covered by an administrative order removing an unskilled labor classification from the classified service to the unclassified service because the commission, or director, found "it impracticable to include in the competitive classified service."

The principle that a statute should not be interpreted so as to make it ineffective (Brief 5) urged by

the Attorney General is accepted and approved. He cites 50 Ohio Jurisprudence 2d, page 206, Section 220, and the opinion of the Attorney General, supra. The support is adequate as applied, but the quoted rule can not be said to justify an interpretation that results in the total nullification of a substantial portion of a legislative act providing civil service protection for unskilled state employees. It is a far less reasonable interpretation to suggest that the Legislature on the one hand gave civil service protection to the unskilled labor class and at the same time gave an administrative officer or body the right to take that protection away from the class than it is to suggest that the protection was conferred on the class and only certain positions, for good reason, could be removed from it by administrative order.

So radical a change in policy calls for legislative change. If it be left to interpretation by judicial decision, that should come from the Supreme Court of Ohio.

The Common Pleas Court and the State Personnel Board of Review were in error in holding that these appellants were in the unclassified service and without a right of appeal, the decision of the board having been predicated upon an incomplete and improper order of the Civil Service Commission. The judgment of the Common Pleas Court is reversed and the case remanded for further proceeding according to law.

Judgment reversed, cause remanded.

BRYANT, P.J., and DUFFY, J., concur.

APPENDIX F

Decision of the Supreme Court of Ohio

In re Appeal of Donald F. Knox

January 11, 1967

Rehearing

It is ordered by the court that rehearing in this case is denied.

Thomas L. Startzman
Clerk